

83-152

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1983

GEORGE L. KARAPINKA,

Petitioner

vs.

UNION CARBIDE CORPORATION,

Respondent

UNITED STATES DISTRICT JUDGE
DICKINSON R. DEBEVOISE

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

GEORGE L. KARAPINKA
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QUESTIONS PRESENTED

I. Whether the district court can deny the summary judgment motion, motion according to Rule 56(a), solely under the pretext that it had dismissed the case when at the time of the dismissal the district court did not have jurisdiction over the case; jurisdiction had been in the court of appeals.

II. Whether the district court and the court of appeals should decide the pleadings and other writings of pro se litigant, who is ignorant of legal procedures, on the merits and not on irrelevant technicalities; and whether these courts should explain their rulings to pro se litigant.

TABLE OF CONTENTS

	<u>Page</u>
Questions Presented	i
Citation to Opinions Below	1
Jurisdiction	2
Statement of the Case	2
Reasons for Granting the Writ	21
Conclusion	35

Appendix

Order of the U.S. Court of Appeals for the Third Circuit, Dated May 12, 1983	a-1
Opinion of the U.S. District Court, Entered March 30, 1983	a-2
Order of the U.S. District Court, Entered March 30, 1983	a-4
Petition to Hear the Argument on the Motion, Filed October 5, 1981	a-5
Appellant's Response to the Clerk's Office of the Court of Appeals Com- munication Dated February 16, 1982, Dated March 11, 1982	a-12
Motion for Oral Argument, Dated June 7, 1982	a-14
Mandate of the U.S. Court of Appeals, Dated December 8, 1982	a-16
Letter from George L. Karapinka to Judge Dickinson R. Debevoise	a-18

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Cohen v. Beneficial Loan Corp.</u> , 337 U.S. 541	7,14, 22,30
<u>Conley v. Gibson</u> , 355 U.S. 148	14,28, 30
<u>District 65, Distributive, Processing & Office Workers Union v. Mc Kague</u> , 216 F.2d 153 (3rd Cir., 1954)	25
<u>Gillespie v. U.S. Steel</u> , 379 U.S. 148 .	7,14, 22,31
<u>Woods v. Robb</u> , 171 F.2d 539 (5th Cir. 1948)	11,31
<u>Statutes:</u>	
28 U.S.C. Sec. 1254	2
28 U.S.C. Sec. 1291	15,20, 22,30
42 U.S.C. Sec. 2000e-5	2
Federal Rules of Civil Procedure	
Rule 7(b)	5,29
Rule 54(b)	15,16, 24,26
Rule 56(a)	19,21, 34
Rules of U.S. District Court for the District of New Jersey	
Rule 12 C	5,29
<u>Other:</u>	
9. Moores Federal Practice, 2nd ed.	25

Petitioner pro se prays that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Third Circuit in denying petitioner's Petition for Writ of Mandamus No. 83-3176 on May 12, 1983, to review the proceedings in that Court in the appeal No. 81-2941 and to review the proceedings in the U.S. District Court for the District of New Jersey in Civil Action No. 81-1393, where these Courts departed from the accepted and usual course of judicial proceedings.

The petitioner pro se who is a chemist has very little knowledge of law; he is, therefore, requesting all the records from the District Court and from the Court of Appeals to be forwarded to this Court. Petitioner pro se is praying this Court to consider all these records and to pass the judgment on the merits of his case.

CITATIONS TO OPINIONS BELOW

The U.S. Court of Appeals for the Third Circuit dismissed petitioner's Petition for

Writ of Mandamus with the Order of May 12, 1983, a copy of which is annexed hereto as a-1*. The District Court's Opinion and Order are attached hereto as a-2 and a-4.

JURISDICTION

Petitioner's Petition for Writ of Mandamus was dismissed by the U.S. Court of Appeals for the Third Circuit May 12, 1983 (a-1). The jurisdiction of this Court is invoked under Title 28, U.S.C. Sec. 1254.

STATEMENT OF THE CASE

The complaint charging Union Carbide Corporation, the respondent, with the violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e-5) in dismissing petitioner pro se from his position of Research Scientist, was filed May 6, 1981. Petitioner is seeking reinstatement to his former position with back pay and with back benefits, and damages in excess of \$10,000.

* References preceded by "a" refer to the Appendix below.

July 13, 1981 petitioner filed and served upon Union Carbide Corporation Amended Complaint consisting of the Complaint which was sworn and notarized. This Sworn Complaint contained the essential testimony in support of petitionr's charge of his dismissal on the basis of discrimination.

July 17, 1981 respondent filed Notice of Motion to Dismiss or for Summary Judgment with the Affidavit of Karen W. Readshaw who avers there to the statements that she does not have first hand knowledge of. The Notice nor the Affidavit did not state any reasons in support of the Motion to Dismiss or for Summary Judgment. The Brief in Support of Motion to Dismiss or for Summary Judgment was not filed, as the Clerk's Docket Entries show; petitioner pro se did not know about this fact until March of 1983.

Petitioner pro se being under the impression that respondent's Motion to Dismiss or for Summary Judgment was filed properly, fi-

led August 13, 1981 his Brief in Opposition to the Defendant's Motion to Dismiss or for Summary Judgment and the Affidavit of George L. Karapinka in opposition to that Motion.

September 4, 1981 petitioner pro se filed the statement that in opposition to respondent's Motion to Dismiss or for Summary Judgment the petitioner will rely in his argument on September 14, 1981 on the Affidavit of George L. Karapinka and his Brief in Opposition to Defendant's Motion to Dismiss or for Summary Judgment.

September 21, 1981 petitioner filed his Motion to Dismiss Defendant's Motion to Dismiss or for Summary Judgment, the countermotion for summary judgment in petitioner's favor in which he had stated that the sworn Amended Complaint clearly states that the discriminatory practices of the respondent are of continuous nature. The District Court never ruled on this motion.

October 5, 1981 the District Court ruled that respondent's Motion to Dismiss or for Su-

Summary Judgment has been withdrawn although no withdrawal of that motion was made by the respondent. This motion was not filed in accordance with Rule 7(b) of F.R.C.P. nor with Rule 12 C of the Rules of the U.S. District Court for the District of New Jersey. Since that Motion was not filed it could not have been withdrawn.

October 5, 1981 petitioner filed his Petition to Hear the Argument on the Motion (a-5) requesting District Court for the oral argument on his summary judgment countermotion which was filed September 21, 1981. This Petition was never granted, it was ignored.

October 19, 1981 the argument on petitioner's Motion for Judgment by Default, which was filed September 28, 1981, was held. Petitioner showed there that the respondent did not serve the Answer to the Complaint on time and therefore defaulted. The District Court in its ruling on October 19, 1981 denied petitioner's Motion for Judgment by Default. No

other motions were argued on that day as the transcript of that argument clearly shows. This fact is also stated by the respondent in it's Statement in Opposition to Motion for Re-Argument which was filed November 4, 1981.

October 23, 1981 respondent filed it's Motion to Compel Plaintiff to Appear for Deposition and for Costs and Attorney Fees. This deposition was not related to petitioner's countermotion for summary judgment. Respondent's Answer to the Complaint was not served on the petitioner yet at that time.

Since petitioner's countermotion for summary judgment, Motion to Dismiss Defendant's Motion to Dismiss or for Summary Judgment (filed September 21, 1981) and amended October 5 1981 and his Petition to Hear the Argument on that Motion (filed October 5, 1981, a-5) were not considered by the District Court, petitioner filed on October 29, 1981 his motion for re-argument of his summary judgment counter claims, actually for argument since there was

no previous argument on these counter claims.

October 30, 1981 petitioner filed his Notice of Appeal, appealing District Court's ruling on summary judgment on October 5, 1981 and on judgment by default on October 19, 1981. This appeal was docketed as No. 81-2941 in the U.S. Court of Appeals for the Third Circuit.

In his pleadings in the Court of Appeals petitioner described in detail, with appropriate documentation, the proceeding in the District Court. He established the point that the ruling of the District Court was final, as defined by this Court in Cohen v. Beneficial Loan Corp., 337 U.S. 541, and in Gillespie v. U.S. Steel, 379 U.S. 148, and therefore appealable. In Appellant's Brief the petitioner showed that the Court of Appeals should pass summary judgment in his favor on the basis of the evidence presented to the District Court, Sworn Amended Complaint (filed July 13, 1981) and Affidavit of George L. Karapinka (filed

August 13, 1981). He requested the Court of Appeals to do so.

November 2, 1981 District Court entered the Order denying petitioner's Motion for Judgment by Default. November 5, 1981 District Court entered an amendment to this Order (Notice of Appeal was filed October 30, 1981) which states:"ORDERED that the motions of plaintiff George L. Karapinka for judgment by default, to dismiss and for summary judgment are denied." The District Court never considered before the filing of the Notice of Appeal petitioner's countermotion for summary judgment as the record clearly shows, therefore there had been no basis for this amendment to the Order.

November 10, 1981 (or possibly November 11, 1981) petitioner pro se received the telephone call from Judge Debevoise's law clerk. He wanted to know if petitioner filed any reply to respondent's Motion to Compeel Plaintiff to Appear for Deposition and Attorneys' Fees

which was filed October 23, 1981 and returnable November 16, 1981. Petitioner answered that he did not. The law clerk then asked if the petitioner will attend the argument on November 16, 1981; petitioner answered that he was under the impression that he had to.

November 16, 1981 during the argument on respondent's Motion to Compel Plaintiff to Appear for Deposition and Attorneys' Fees, petitioner pro se stated that he was under the believe that during the pendency of his appeal (Notice of Appeal was filed October 30, 1981), which if decided in his favor will terminate the action, he should not take part in the discovery process. The District Court suggested the deposition to be performed November 16, 1981. After the petitioner stated that he could not do it, District Court suggested the date of December 2, 1981.

During the argument November 16, 1981 petitioner was instructed by the District Court to accept respondent's Answer to the Complaint.

Petitioner pro se not realizing the fact that the jurisdiction over the case was in the Court of Appeals and not in the District Court attended this argument. Since the petitioner did not file any reply to this Motion, according to Local Rule 12 C of which he was not aware then, he was not permitted to take part in the argument.

November 9, 1981 District Court entered the Order and the Letter Opinion ordering the case to proceed during the pendency of the appeal.

November 30, 1981 petitioner filed his Motion to Vacate the Order of November 9, 1981, claiming that his appeal was proper and that the proceedings in the District Court should be interrupted until the outcome of the appeal. In the Notice of that Motion the petitioner informed the respondent that no discovery proceedings will take place until the resolution of that Motion.

December 2, 1981 respondent filed it's

Motion to Dismiss the Action and for Costs and Attorneys' Fees.

December 2, 1981 petitioner received the Order of the District Court directing him to appear on December 1, 1981 for his deposition; this Order was entered November 24, 1981. The fact that the Order was received by the petitioner one day after the date of the deposition was stated in petitioner's letter to Judge Debevoise of December 2, 1981 and in the Affidavit of George L. Karapinka (filed March 7, 1983).

December 14, 1981 petitioner filed his Answer to Defendant's Motion to Dismiss the Action and for Costs and Attorneys' Fees stating therein that the petitioner could not have taken part in his deposition, because due to his understanding of Woods v. Robb, 171 F.2d 539 his right to his summary judgment motion would have been lost if he were to be sworn in for his deposition.

By the Order of the District Court of De-

cember 23, 1981 petitioner's Motion to Vacate the Order of November 9, 1981 was denied. Respondent's motion to dismiss with prejudice was granted; attorneys' fees of \$250.00 were awarded to respondent. The District Court disregarded the fact that the Order directing the petitioner to appear for his deposition on December 1, 1981 was received by the petitioner December 2, 1981. These Orders were entered while the petitioner's appeal was pending in the Court of Appeals and the District Court did not have any jurisdiction over this case then.

The respondent served upon petitioner on January 15, 1982 the motion for leave to file as part of it's Supplemental Appendix in the Court of Appeals documents filed in the District Court after the notice of appeal had been filed, and to strike pages 58, 59, 59a from the Appendix. These pages contained the statement read by the petitioner into the record October 19, 1981. This statement on transcription by the reporter was made unintelligible.

Petitioner, therefore, incorporated this statement verbatim into the Appendix. In his response to this Motion petitioner showed that the great majority of the documents in the Supplemental Appendix, documents relied heavily by Union Carbide in it's argument in Appellee's Brief, were filed in the District after the Notice of Appeal was filed October 30, 1981 according to 28 U.S.C. Sec. 1291. These documents, therefore, could not be part of the record on appeal and could not be used by the Court of Appeals in forming it's decision. The same argument was advanced in petitioner's motion to strike all the references to the documents contained in Supplemental Appendix; this motion was served February 9, 1982.

By the letter of February 16, 1982 from the Office of the Clerk of the Court of Appeals for the Third Circuit, petitioner was informed that his appeal will be submitted to a panel of the Court sitting during the

the week of March 29, 1982 for possible dismissal due to an alleged jurisdictional defect. In response to this letter petitioner pro se served on March 12, 1982 Appellant's Response to the Clerk's Office of the Court of Appeals Communication Dated February 16, 1982 (a-6). In that Answer petitioner showed that his appeal was proper under 28 U.S.C. Sec. 1291 on the basis of this Court's ruling in Cohen v. Beneficial Loan Corp., 337 U.S. 541 and in Gillespie v. U.S. Steel, 379 U.S. 148. Petitioner pro se also requested the Court of Appeals to consider this Court's ruling in Conley v. Gibson, 355 U.S. 41 at 48.

By the letter from the Office of the Clerk of U.S. Court of Appeals for the Third Circuit of June 2, 1982, petitioner was informed that his appeal will be submitted on briefs with NO oral argument on June 16, 1982. In response to this letter petitioner served on June 7, 1982 his Motion for Oral Argument (a-14). This Motion was denied by the Order of June 24, 1982.

By the Order of the U.S. Court of Appeals for the Third Circuit of June 25, 1982 (a-16) appellee's motion for leave to file Supplemental Appendix and to strike pages A-58, A-59 and A-59a of Appellant's Appendix were granted and appellant's motion to strike appellee's Suplemental Appendix was denied. The appeal was dismissed for want of an appealable order. F.R.Civ.P. 54(b). Costs were taxed against appellant.

Petitioner pro se not understanding this Order of June 25, 1982, served on August 5, 1982 his Motion for the Opinion (clarification). This Motion was denied by the Order of the Court of Appeals of August 23, 1982.

On July 3, 1982 petitioner served his Petition for Rehearing stating therein that the Court of Appeals must have overlooked the fact that the appeal was filed under 28 U.S.C. Sec. 1291 and the basis for the appeal were the rulings of this Court: Cohen v. Beneficial Loan Corp., 337 U.S. 541 and Gillespie

v.U.S. Steel, 379 U.S. 148. Petition for Re-hearing was denied on July 21, 1982.

October 18, 1982 petitioner pro se filed in this Court his Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit No. 82-664. The Court of Appeals (and the District Court) did not supply this Court with the records that petitioner had requested of the Court of Appeals. This Petition was denied on December 6, 1982.

December 8, 1982 Court of Appeals issued the mandate to the District Court (a-16).

January 10, 1983 District Court issued the Order on Mandate. This Order omitted the very essential part of Court of Appeals' mandate: "F.R.Civ.P. 54(b)" (a-16).

January 27, 1983 petitioner filed his Motion to Vacate the Orders of the District Court of December 23, 1981 and of January 10 1983. This Motion was denied on March 1, 1983.

Motion for Reargument of the Motion to Vacate the Orders of District Court of Decem-

ber 23, 1981 and of January 10, 1983 was filed March 9, 1983. This Motion was amended March 11, 1983. This Motion was filed because the District Court overlooked or disregarded the essential part of the Court of Appeals' mandate "F.R.Civ.P. 54(b)". Order of January 10, 1983 was the Order on Mandate.

March 7, 1983 petitioner filed his Motion for Summary Judgment supported by the brief and affidavits of George L. Karapinka which were filed on March 7, 1983, on March 16, 1983, by the Sworn Amended Complaint which was filed July 13, 1981, and by the affidavit of George L. Karapinka filed August 13, 1981. The petitioner proved there that there was no question as to material fact that the petitioner was dismissed by Union Carbide on the basis of his national origin.

No testimony nor response of any kind were filed by Union Carbide. This Motion was decided by the District Court to be heard on papers (Rule 78), although the petitioner spe-

cifically requested oral argument on it by his letter to Judge Debevoise of March 16, 1983 (a-18), in which petitioner pro se stated that he did not present his case properly on papers. By the Opinion (a-2) and by the Order (a-4) which were entered March 30, 1983 this Motion was denied on the ground that District Court dismissed the case with prejudice on December 23, 1981. All the facts, however, show that at that time jurisdiction over this case was with the Court of Appeals and therefore the District Court could not have dismissed this case.

March 23, 1983 Union Carbide filed it's Motion for Costs, Attorneys' Fees and Injunctive Relief. There was no basis whatsoever for this Motion. Union Carbide objected to petitioner's two proper motions: Motion to Vacate District Court's Orders of December 23, 1981 and of January 10, 1983 (and the subsequent motion for reargument), and the Motion for Summary Judgment to which Union Carbide

did not respond, as the Clerk's Docket Entries show. These proper motions were filed in a period of over three month since the issue of the mandate by the Court of Appeals. The Motion for Injunctive Relief, by which petitioner was forbidden to file any motions in the District Court, was granted. The Order was enterd on April 14, 1983.

April 7, 1983 petitioner filed in the U.S. Court of Appeals for the Third Circuit his Petition for Writ of Mandamus No. 83-3176, requesting the Court of Appeals to direct Judge Debevoise to vacate and set aside his Order of March 28, 1983 denying petitioner's Motion for Summary Judgment, which was filed March 8, 1983 in accordance with Rule 56(a) of F.R.C.P., and also to direct this Judge to hear that Motion on it's merits. The basis for this petition was the fact that the District Court abused it's discretion by not following the mandate of the Court of Appeals (a-16):"F.R.Civ.P. 54(b)" and by ignoring

the fact that the District Court did not have jurisdiction to dismiss the case on December 23, 1981. The jurisdiction at that time was in the Court of Appeals as the consequence of the Notice of Appeal which was filed October 30, 1981 under 28 U.S.C. Sec. 1291. This Petition for Writ of Mandamus was denied on May 12, 1983. The Court of Appeals did not state any reasons for the denial. Petitioner pro se is assuming that his Petition was dismissed on some technicality of which he is not aware.

May 24, 1983 petitioner pro se requested a copy of Docket Entries from the Clerk of the District Court in Newark, N.J. This request was ignored. June 10, 1983 petitioner requested again by certified mail a copy of the Docket Entries from the Clerk in Newark, N.J. The copy of the Docket Entries was mailed to the petitioner from the District Court in Trenton, N.J. This fact suggests that the case has been transferred from Newark to Tren-

ton division while the judge in charge of the case is sitting in Newark? No reason was given to the petitioner pro se.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the U.S. Court of Appeals for the Third Circuit and the U.S. District Court for the District of New Jersey have departed from the accepted and usual course of judicial proceedings. The exercise of this Court's power of supervision is needed.

I. THE DISTRICT COURT CAN NOT DENY THE SUMMARY JUDGMENT MOTION, MOTION ACCORDING TO RULE 56(a), SOLELY UNDER THE PRETEX THAT IT HAS DISMISSED THE CASE WHEN AT THE TIME OF THE DISMISSAL THE DISTRICT COURT DID NOT HAVE JURISDICTION OVER THE CASE; JURISDICTION HAD BEEN IN THE COURT OF APPEALS

Following the mandate of the Court of Appeals (a-16) petitioner filed his Motion for Summary Judgment, supported by affidavits and Sworn Amendment to the Complaint, on March 7, 1983 in accordance with Rule 56(a) which states:

"A party seeking to recover upon a claim

counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." (Emphasis added).

Union Carbide did not file any response to this Motion, as Clerk's Docket Entries show. The District Court decided this Motion on papers (Rule 78) on March 30, 1983, although the petitioner specifically requested oral argument on this Motion by his letter to Judge Debevoise of March 16, 1983 (a-18). This Motion was denied solely under the pretext that the District Court had dismissed the case on December 23, 1981. At that time the appeal in this case in accordance with 28 U.S.C. Sec. 1291 was pending in the Court of Appeals for the Third Circuit (Notice of Appeal was filed October 30, 1981). This appeal was proper in accordance with the rulings of this Court in Cohen v. Beneficial Loan Corp. 337 U.S. 541 and in Gillespie v. U.S. Steel, 379 U.S. 148. The District Court did not ha-

ve jurisdiction over the case at that time and could not had dismissed it.

The Court of Appeals had jurisdiction over this case following the filing of the Notice of Appeal on October 30, 1981. The misunderstanding of Cheryl J. Turetsky, Staff Attorney in the Office of the Clerk of the Court of Appeals for the Third Circuit as to the correctness of the appeal under 28 U.S.C. Sec. 1291 was clarified by the Appellant's Reponse to the Clerk's Office of the Court of Appeals Communication Dated February 16, 1982 (a-6). The appeal was then submitted to the panel of the Court of Appeals to be decided on it's merits.

The fact that the Court of Appeals entertained the appeal on it's merits is clearly shown by the Orders of the Court of Appeals of June 24, 1982 denying petitioner's Motion for Oral Argument, and of June 25, 1982 (a-16) which eventually became the mandate of the Court of Appeals. The Court of

Appeals granted and denied various motions connected with this appeal, after a prolonged time (about six month) it dismissed the appeal for want of an appealable order under "F.R.Civ.P. 54(b)", but not for want of jurisdiction, and it ordered petitioner to pay the costs of the appeal. F.R.Civ.P. 54(b):

"(b) Judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination that there is no just reason for delay and upon a expressed direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

All the facts show that the Court of Appeals have had jurisdiction over the case from the time of the filing of the Notice of Appal October 30, 1981 to the time of the is.

suance of the Mandate December 8, 1982. The District Court, therefore, did not have jurisdiction over the case on December 23, 1981 and could not dismiss it on that day. Jurisdiction can only reside in one court at a time. The Order of the District Court of December 23, 1981 is therefore a nullity and the District Court should have considered the Summary Judgment Motion on it's merits on March 28, 1983.

According to 9 Moore's Federal Practice, 2nd ed., 203.11 decisions of the court of appeals in which the district court lost jurisdiction over the action with the filing of the notice of appeal, are legion. See Note 1 therein. These cases show that when the notice of appeal named an order that was not appealable, the district court did not have jurisdiction to proceed with the case after the notice of appeal had been filed, see for example District 65, Distributive, Processing & Office Workers Union v. Mc Kague, 216 F.2d

153 (3rd Cir., 1954), where the Court of Appeals had dismissed the appeal for want of an appealable order under F.R.Civ.P. 54(b) but the District Court did not have jurisdiction over the case until the mandate was granted.

Regardless of the question of jurisdiction over the case at the time of it's alleged dismissal, District Court should have considered the Summary Judgment Motion on it's merits because of the fact that Rule 56 (a) supra, clearly states that the summary judgment motion can be filed and therefore entertained by the district court "at any time", that is regardless of the stage of litigation of the case, even after it's alleged dismissal on a technicality.

The petitioner does not see any reason why the Court of Appeals did not consider his Petition for Writ of Mandamus. The reason for the denial must have been a technicality of which the petitioner is not aware.

On the basis of the facts discussed above, petitioner pro se is praying this Court to grant him this Petition for a Writ of Certiorari.

II. THE DISTRICT COURT AND THE COURT OF APPEALS SHOULD DECIDE THE PLEADINGS AND OTHER WRITTINGS OF PRO SE LITIGANT, WHO IS IGNORANT OF LEGAL PROCEDURES, ON THE MERITS AND NOT ON IRRELAVANT TECHNICALITIES; AND THESE COURTS SHOULD EXPLAIN THEIR RULINGS TO PRO SE LITIGANT

This Court dealt with the problem of pleadings and related documents in Conley v. Gibson, 355 U.S. 41 at 48:

"The Federal Rules reject the approach that pleading is a game of skill in which one mis-step by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

The District Court for the District of New Jersey, Judge Debevoise, and the Court of Appeals for the Third Circuit interpreted petitioner's pro se pleadings in light of the legalistic technicalities alone and not on their merits, inspite of the fact that petitioner pro se called attention of these

Courts to the ruling of this Court in Conley v. Gibson, supra. The District Court and the Court of Appeals probably did not consider Conley because this ruling refers specifically to "counsel" and not to a pro se litigant. The petitioner, therefore, is respectfully requesting this Court to grant this Petition for a Writ of Certiorari and to examine the scope of application of Conley v. Gibson ruling.

The respondent, Union Carbide, performed ~~a~~ every skillful, if not fraudulent, pleading manuver. Following the service of petitioner's Complaint upon Union Carbide on June 12, 1981, Union Carbide did not file the Answer but filed on July 17, 1981 a notice of motion for an order dismissing the complaint or granting summary judgment in defendant's favor. A nebuleous and irrelavant affidavit of Karen W. Readshaw was also filed in which the affiant avers to statements that she does not have first hand knowlege. No brief was

filed as the Docket Entries show. Neither the Notice of the Motion nor the Affidavit state, in violation of Rule 7(b) of F.R.C.P., any ground for the motion. Moreover, since no brief was filed, this motion was not filed in accordance with Rule 12 C of the Rules of the U.S. District Court for the District of New Jersey: "No application will be heard unless the moving papers, and a brief prepared in accordance with General Rule 27, or a statement that no brief is necessary and the reason therefor, ... are received at the clerk's office at the place of allocation.." Since no Answer nor the motion to dismiss or for summary judgment was filed in time Union Carbide defaulted. (District Court denied petitioner's pro se Motion for Judgment by Default on October 19, 1981).

Petitioner pro se unaware of these facts at that time filed his countermotion for summary judgment on September 21, 1981 and the petition for oral argument on that motion .

on October 5, 1981 (a-5). All the prerequisites for the summary judgment countermotion were filed: sworn testimony in the form of Sworn Amended Complaint (filed July 13, 1981) Affidavit of George L. Karapinka (Filed August 8, 1981), Notice of Motion stating the ground for the Motion and the reason why the brief is unnecessary (filed September 21, 1981). Union Carbide did not respond to this Motion in any form. The District Court did not consider this Motion as the record clearly shows; the District Court ignored it.

The District Court's handling of the above situation was contrary to the ruling of this Court in Conley v. Gibson, supra.

This handling of the petitioner's summary judgment countermotion by the District Court was appealed to the Court of Appeals for the Third Circuit. Notice of Appeal was filed October 30, 1981 under 28 U.S.C. Sec. 1291 and in accordance with this Court's ruling in Cohen v. Beneficial Loan Corp., 337

U.S. 541 and Gillespie v. U.S. Steel, 379 U.S. 148. The District Court considered this appeal, apparently, as an interlocutory appeal; however this appeal did not meet any criteria for an interlocutory appeal.

For the reasons not understood by petitioner pro se, he was ordered to take part in the deposition in which due to a misunderstanding it was impossible for him to take part. Petitioner also objected to the deposition on the ground that according to Mood v. Robb, 171 F.2d 539 (5th Cir. 1948) his swearing in for the deposition would deprive him of his right to his summary judgment motion. The District Court disregarded all these facts and dismissed the case on December 23, 1981, without prior instruction to the petitioner pro se what the consequences of not attending the deposition might be, while the jurisdiction over the case was in the Court of Appeals due to a proper Notice of Appeal under 28 U.S.C. Sec. 1291 which was filed

October 30, 1981.

Another form of pleading, although improper , by Union Carbide was shown in the Court of Appeals where it filed as a part of Supplemental Appendix a number of the documents, some of them of the amended nature (Order of November 5, 1981). These documents were filed in the District Court after the Notice of Appeal was filed. These improperly filed documents by the Order of the Court of Appeals (a-16) were permitted into the record on appeal and subsequently were used by the Court of Appeals in arriving to it's decision to dismiss the appeal.

The Order of the Court of Appeals of June 25, 1982 (a-16) was not understood by the petitioner; he therefore moved the Court of Appeals for the opinion - explanation. The Court of Appeals without any explanation denied this Motion.

The essential part of the Court of Appeals' Mandate, the direction of the District

Court to "F.R.Civ.P. 54(b)" was omitted by the District Court from it's Order on Mandate. This fact was the subject of petitioner's oral argument on Motion to Vacate District Court's Orders of December 23, 1981 and of January 10, 1983. This Motion was denied. This fact again was the subject of petitioner's Motion for Reargument of Motion to Vacate District Court's Orders of December 23, 1981 and of January 10, 1983. This Motion was denied. District Court by denying without explanation all these Motions, never explained to the petitioner pro se why it omitted from it's Order on Mandate of January 10, 1983 that essential part of the Court of Appeals Mandate: "F.R.Civ.P. 54(b)".

Petitioner's pro se Motion for Summary Judgment, proper under Rule 56(a), to which Union Carbide did not reply, was not considered on it's merits by the District Court but denied on the basis of an irrelevant technicality, which is the subject of I of this Petition.

The denial of Petition for Writ of Mandamus without any explanation by the Court of Appeals (a-1) was prejudicious to the petitioner pro se because this prevented him from correcting a possible error, on the basis of which his Petition was denied, and further prosecute successfully his case.

Two summary judgment motions according to Rule 56(a) of F.R.C.P. were filed, supported by sworn testimony to which Union Carbide did not respond and which petitioner should have won on merits, he lost the case on irrelevant technicalities. Additionally he incurred expenses by traveling to New Jersey from West Virginia (over 700 miles round trip) to defend against improper Union Carbide's motions in the District Court while the District Court did not have jurisdiction to entertain these motions during the pendency of the appeal.

CONCLUSION

On the basis of all the facts presented here in this Petition and on the basis of the facts contained in the records of this case in the Court of Appeals and in the District Court, which records the petitioner had requested these Courts to forward them to this Court, the petitioner prays that this Court will issue a writ of certiorari.

Respectfully submitted,

GEORGE L. KARAPINKA
Petitioner pro se
3557 Collins Ferry Road,
B-14
Morgantown, West Virginia
26505

(304) 599-8686

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT

April 5, 1983

C.A. No. 83-3176

GEORGE L. KARAPINKA,
Petitioner
vs.

UNION CARBIDE CORPORATION,
Defendant (related to
D.N.J. Civ.
UNITED STATES DISTRICT NO. 81-1393)
JUDGE DICKINSON R. DEBEVOISE,
Respondent

Present: SEITZ, Chief Judge, GIBBONS &
BECKER, Circuit Judges

Submitted is petitioner, George Karapinka's petition for writ of mandamus

in the above-captioned case listed May 30, 1983 or as the Court decides.

Respectfully,

SM/DFM/lsc
enc.

Sally Mrvos/DM
Clerk

The foregoing Motion ~~is/are~~ for a writ of
mandamus is denied

By the Court,

Dated: May 12, 1983 X Seitz
Chief Judge

dt/cc: Mr. GLK
EPL

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of U.S. Post Office
Dickinson R. Debevoise and Courthouse
Judge Newark, N.J.07101

NOT FOR PUBLICATION ORIGINAL FILED
Allyn Z. Lite, Clerk
MAR 30 1983

March 28, 1983

RE: George L. Karapinka
v. Union Carbide Corporation
Civil Action No. 81-1393

Mr. George L. Karapinka
3557 Collins Ferry Road, B-14
Morgantown, West Virginia 26505

OPINION

Jill R. Lerner, Esq.
Pitney, Hardin, Kipp & Szuch
163 Madison Avenue
CN 1945
Morristown, New Jersey 07960

Dear Mr. Karapinka and Ms. Lerner:

Plaintiff, George L. Karapinka, has moved
for summary judgment in his favor.

I shall not recite again the history of
this litigation. It has been set forth in va-
rious bench opinions which I have delivered
in the past.

Suffice it to say, by order filed December
23, 1981 I dismissed the case with prejudice.
No appeal was taken from that order. By order
dated March 1, 1983 I denied plaintiff's mo-
tion to vacate December 23, 1981 order of dis-
missal and to vacate my January 10, 1983 or-
der on mandate (reflecting the Third Circuit's
dismissal of plaintiff's appeal from an in-

terlocutory order).

There is no basis whatsoever for plaintiff's present motion for summary judgment, since the case has been dismissed. Therefore his motion will be denied. An order to this effect is enclosed.

Very truly yours,

(signed)

Dickinson R. Debevoise
U.S.D.J.

DRD:el
Enc.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 81-1393

GEORGE L. KARAPINKA,

Plaintiff, : :

V. : ORDER

UNION CARBIDE CORPORATION, :

ORIGINAL FILED
MAR 30 1983
Allyn Z. Lite,
Clerk

For the reasons set forth in the opinion
of the court dated this date.

IT IS on this 28th day of March 1983
O R D E R E D that plaintiff's motion for
summary judgment be and the same hereby is
denied.

(signed)

Dickinson R. Debevoise
U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

GEORGE L. KARAPINKA, : THE HONORABLE
Plaintiff : DICKINSON R.
vs. : DEBEVCISE
UNION CARBIDE CORPORATION, : Civil Action
Defendant : No. 81-1393

PETITION TO HEAR THE ARGUMENT ON THE MOTION

I George L. Karapinka, the plaintiff respectfully request the Honorable Court to hear the argument on my Motion to Dismiss the Defendant's Motion which was mailed to Clerk, United States District Court, Trenton, New Jersey on September 17, 1981, and which was amended October 5, 1981.

I respectfully request that this argument be heard on October 19, 1981 before the argument on my Motion for Judgment by Default which argument is scheduled for October 19, 1981. If it is not feasible to hear the argument on the Motion to Dismiss the Defendant's Motion on October 19, 1981, then I respectfully request the Honorable Court to hear the arguments on both motions on November 2, 1981.

Original Filed Respectfully submitted,
OCT 5 1981
Angelo W. Locas- George L. Karapinka
cio, Clerk Plaintiff, pro se

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2941

GEORGE L. KARAPINKA :
Plaintiff-Appellant

vs. :

UNION CARBIDE CORPORATION,:
Defendant-Appellee

APPELLANT'S RESPONSE TO THE CLERK'S
OFFICE OF THE COURT OF APPEALS COM-
MUNICATION DATED FEBRUARY 16, 1982

This pleadind is in response to the letter from the office of the Clerk United States Court of Appeals for the Third Circuit, Ms. Cheryl J. Turetsky, dated February 16, 1982. In this letter the appellant was informed that the Clerk will submit this appeal to a panel of the United States Court of Appeals sitting during the week of March 29, 1982 for possible dismissal due to an alleged juris - dictional defect.

The review of the Office of the Clerk, apparently, involved the material contained in Supplemental Appendix for Defendant-Appellee Union Carbide Corporation (SA) and the refe-

rences made to this Supplemental Appendix in the Brief of Defendant-Appellee Union Carbide Corporation. This material was filed in the District Court after the Notice of Appeal was filed (October 30, 1981) and therefore this material is not a part of the Record on Appeal and should not have any bearing on this appeal.

The jurisdictional defect does not exist and the Court of Appeals has full jurisdiction over this appeal under 28 U.S.C. 1291.

Appellant's Brief and the Reply Brief of the Appellant served February 18, 1982, filed probably February 22, 1982, and the Record on Appeal clearly show that the District Court for the District of New Jersey denied appellant his claimed right to a summary judgment hearing. This appeal, therefore, is taken from the final ruling of the United States District Court, as defined by the United States Supreme Court in Q Chen v. Beneficial Loan Corp., 337 U. S. 541, 545-547.

The facts supporting summary judgment in "appellant's favor are stated in Sworn Amended

Complaint (A-8,9,10)* and in the Affidavit of George L. Karapinka (A-27) Items 4 and 7. The District Court was made aware of theses facts in A-33, in A-34, in A-42, and in A-58 (4th paragraph). Appellee-Union Carbide did not offer any relevant sworn testimony in opposition to appellant's sworn testimony. Union Carbide alleges that it withdrew the irrelavant sworn testimony, Affidavit of Karen W. Readshaw (Brief of Defendant-Appellee Union Carbide Corporation p.4,5,6). The District Court was formally requested by the petition (filed October 5, 1981, about 10:20 AM) to hear the argument on the appellant's countermotion (A-42); see the attached Exhibit (~~Exhibit the same as~~
~~45~~). The District Court refused this petition.

All the facts supporting summary judgment and the petition to hear the argument (Exhibit) on the motion (A-42) were before the District Court. The District Court refused to consider them before the Notice of Appeal was filed

*(Appendix-page)

October 30, 1981.

The Supplemental Appendix for Defendant-Appellee Union Carbide Corporation (SA) contains in majority the material filed after the Notice of Appeal was filed on October 30, 1981. This material was filed solely for the purpose of denying appellant his right to the appeal. The appellant, therefore, filed his motion to strike this Supplemental Appendix and all the references to this Supplemental Appendix (SA) made in the brief of Defendant-Appellee Union Carbide Corporation. This Motion to Strike the Entire Supplemental Appendix for Defendant-Appellee and to Strike all the References Made to this Supplemental Appendix was served February 9, 1982, filed probably February 11, 1982. The appellant, therefore, respectfully requested this Court to grant him this motion.

As of October 30, 1981, the date of the filing of the Notice of Appeal the denial of the appellant's right to summary judgment hearing by the District Court was final.

As stated in the Appellant's Brief p. 13,14, and in the Reply Brief of Appellant p. 2, the ruling of the District Court in denying appellant his right to summary judgment by refusing to hear the summary judgment countermotion, was prejudicious to the appellant because of his inability, due to his health (Amended Sworn Complaint, A-8) and financial situation, to be involved in a prolonged trial. The appellant underwent open heart surgery to replace his aortic valve in August 1979. See the Amended Sworn Complaint (A-8). The burden of a prolonged trial will deny justice to the appellant. The United States Supreme Court ruled in Gillespie v. U.S. Steel, 379 U.S. 148, 152-154 and references therein, that if as the consequence of the rulings of the District Court denial of justice may result, then this rulings are appealable under 28 U.S.C. 1291. This situation is certainly present in this appeal. See inter alia, Reply Brief of Appellant p.2,3. The refusal of the District Court to grant a

summary judgment hearing may necessitate a prolonged trial which will be much more costly (specially for the appellant) than the summary judgment ruling by this Court, requested by the appellant in his Brief. The United States Supreme Court ruled in Gillespie v. U.S. Steel, 379 U.S. 148, 152-154 at 153:

"And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will be less if we now pass on the questions presented here rather than send the case back with those issues undecided."

In view of the rulings of the United States Supreme Court in the above cases, the Court of Appeals for the Third Circuit has jurisdiction over this appeal under 28 U.S.C. 1291.

In view of the above facts, United States Supreme Court's rulings, and 28 U.S.C. 1291 this Court has jurisdiction over this appeal.

The appellant pro se, without any experience in law, respectfully requests this Court to consider in this appeal the United States Supreme Court ruling in Conley v. Gibson, 355 U.S. 41, at 48:

"The Federal Rules reject the approach that pleading is a game of skill in which one mis-step by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

The appellant respectfully requests this Court to grant oral argument on this appeal.

x George L. Karapinka
Appellant, pro se

March 11, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

GEORGE L. KARAPINKA, : THE HONORABLE
Plaintiff : DICKINSON R.
vs. : DEBEVOISE

UNION CARBIDE CORPORATION, : Civil Action
Defendant : No. 81-1393

PETITION TO HEAR THE ARGUMENT ON THE MOTION

I George L. Karapinka, the plaintiff respectfully request the Honorable Court to hear the argument on my Motion to Dismiss the Defendant's Motion which was mailed to Clerk, United States District Court, Trenton, New Jersey on September 17, 1981, and which was amended October 5, 1981.

I respectfully request that this argument be heard on October 19, 1981 before the argument on my Motion for Judgment by Default which argument is scheduled for October 19, 1981. If it is not feasible to hear the argument on the Motion to Dismiss the Defendant's Motion on October 19, 1981, then I respectfully request the Honorable Court to hear the arguments on both motions on November 2, 1981.

Original Filed OCT 5 1981 Respectfully submitted,
Angelo W. Locascio, Clerk George L. Karapinka
Plaintiff, pro se

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2941

GEORGE L. KARAPINKA, :
Appellant

vs. :

UNION CARBIDE CORPORATION : MOTION FOR ORAL
ARGUMENT

Appellant-pro se was informed June 7, 1982 by the letter dated June 2, 1982 from the Clerk of this Court, that the above captioned appeal will be submitted on briefs, with no oral argument, on June 16, 1982.

Appellant-pro se respectfully requests this Court to grant oral argument on this appeal for the following reasons:

1. Appellant-pro se may not have stated his case adequately in his briefs.
2. Appellant-pro se requested in writing this Court to grant oral argument on this appeal in "APPELLANT'S RESPONSE TO THE CLERK'S OFFICE OF THE COURT OF APPEALS COMMUNICATION DATED FEBRUARY 16, 1982". This Response

was dated March 11, 1982.

Respectfully submitted

x George L. Karapinka
Appellant - pro se

June 7, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2941

GEORGE L. KARAPINKA

v.

UNION CARBIDE CORPORATION

George L. Karapinka, Appellant

(Civil No. 81-1393 - D.N.J. - Trenton)

Submitted Under Third Circuit Rule 12(6)
June 16, 1982

BEFORE: SEITZ, Chief Judge, ROSENN and HIG-
GINBOTHAM, Circuit Judges

ORDER

IT IS HEREBY ORDERED that the appeal is dismissed for want of an appealable order.
F.R.Civ.P. 54(b).

FURTHER ORDERED that appellee's motions for leave to file supplemental appendix and to strike pages A-58, A-59 and A-59a of appellant's appendix are granted and appellant's motion to strike appellee's supplemental appendix is denied.

Costs taxed against appellant.

By the Court,

x Seitz

Cief Judge

ATTEST:

x Sally Mrvos

Sally Mrvos, Clerk

Dated: JUN 25 1982

Certified as a true copy and
issued in lieu of a formal
mandate on December 8, 1982.

Test: Betty J. Robinson

Deputy Clerk, United States
Court of Appeals for the
Third Circuit.

Costs taxed in favor of
appellee, Union Carbide
Corporation as follow

Supplemental Appendix	\$ 64.80
Brief	<u>\$144.15</u>
TOTAL	\$208.95

COPY

George L. Karapinka
3557 Collins Ferry Road, B14
Morgantown, West Virginia
26505

March 16, 1983

Honorable Dickinson R. Debevoise
United States District Judge
United States District Court
United States Post Office & Courthouse
Newark, New Jersey 07101

RE: George L. Karapinka v. Union Carbide Corporation
Civil Action No. 81-1393

Dear Judge Debevoise:

Your letter dated March 11, 1983, stating that my motion for summary judgment returnable on March 28, 1983 will be heard on the papers, was received by me today.

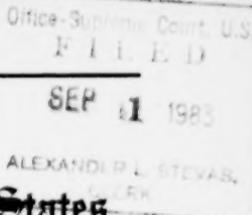
Due to the fact that presently I am convinced that I can not present my case properly on papers, I am respectfully requesting your Honor for the oral argument on my motion for summary judgment on March 28, 1983.

I believe that my motion for summary judgment was filed properly in accordance with Rule 56 of the Federal Rules of Civil Procedure. I also believe that the Order, dated June 25, 1982, of the Court of Appeals for the Third Circuit: "IT IS HEREBY ORDERED that the appeal is dismissed for want of an appealable order. F.R.Civ.P. 54(b)." gives mandate to the District Court to hear the argument on the motion for summary judgment and rule on it.

Respectfully yours,

x George L. Karapinka
Plaintiff pro se

cc: Pitney, Hardin, Kipp & Szuch, Esqs.



In The

Supreme Court of the United States

October Term, 1983

GEORGE L. KARAPINKA,

Petitioner,

vs.

UNION CARBIDE CORPORATION and UNITED STATES
DISTRICT JUDGE DICKINSON R. DEBEVOISE,*Respondents.*

*On Petition for Writ of Certiorari to the United States Court
of Appeals for the Third Circuit*

BRIEF OF RESPONDENT UNION CARBIDE CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EDWARD P. LYNCH
PITNEY, HARDIN, KIPP
& SZUCH

*Attorneys for Respondent
Union Carbide Corporation*

163 Madison Avenue
CN1945

Morristown, New Jersey 07960

EDWARD P. LYNCH (201) 267-3333

JILL R. LERNER

On the Brief

In The

Supreme Court of the United States

October Term, 1983

GEORGE L. KARAPINKA,

Petitioner,

vs.

UNION CARBIDE CORPORATION and UNITED STATES
DISTRICT JUDGE DICKINSON R. DEBEVOISE,

Respondents.

*On Petition for Writ of Certiorari to the United States Court
of Appeals for the Third Circuit*

BRIEF OF RESPONDENT UNION CARBIDE CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the court of appeals properly denied petitioner's petition for a writ of mandamus seeking to compel the district court to hear petitioner's summary judgment motion more than one year after the case had been dismissed with prejudice.

TABLE OF CONTENTS

	<i>Page</i>
Question Presented	i
Table of Contents.....	ii
Table of Citations.....	iii
Opinions Below	1
Jurisdiction	1
Statutory Provisions and Rules	1
Statutes	1
Rules	2
Statement of the Case	3
Summary of Argument	11
Argument:	
I. The court of appeals properly denied Karapinka's petition for a writ of mandamus seeking to compel the district court to hear an improper and untimely motion for summary judgment.	11
II. The issues raised in Point II of Karapinka's petition are not properly before this Court.	14
Conclusion	15

*Contents**Page*

Corporate Disclosure Statement	16
--------------------------------------	----

TABLE OF CITATIONS**Cases Cited:**

Allied Chemical Corporation v. Daiflon, Inc., 449 U.S. 33 (1980)	12
Cochran v. Birkel, 651 F.2d 1219 (6th Cir. 1981), cert. denied, 454 U.S. 1152 (1982)	13
District 65, Distributive, Processing and Office Workers v. McKague, 216 F.2d 153 (3d Cir. 1954)	13
Donovan v. Metal Bank of America, Inc., 521 F.Supp. 1024 (E.D. Pa. 1981)	13
Guadiosi v. Mellon, 269 F.2d 873 (3d Cir.), cert. denied, 361 U.S. 902 (1959)	13
Will v. United States, 389 U.S. 90 (1967)	12

Statutes Cited:

28 U.S.C. §2101(c)	1, 2, 14
42 U.S.C. §2000e <i>et seq.</i>	1, 4

Contents

	<i>Page</i>
Rules Cited:	
Federal Rules of Civil Procedure:	
Rule 54	2, 13
Rule 56	3, 14
Rules of the United States District Court for the District of	
New Jersey:	
Rule 13B.....	3, 5

OPINIONS BELOW

Respondent respectfully submits that the opinions below are adequately identified in the petition.

JURISDICTION

Respondent respectfully submits that the facts relating to this Court's jurisdiction are adequately set forth in the petition only insofar as petitioner seeks review of the denial of his petition for a writ of mandamus. Respondent respectfully submits that this Court does not have jurisdiction over appeal No. 81-2941 of the Court of Appeals for the Third Circuit, and the earlier proceedings in Civil Action No. 81-1393 of the District Court for the District of New Jersey. 28 U.S.C. §2101(c).

STATUTORY PROVISIONS AND RULES

Statutes

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2 *et seq.*, provides in relevant part:

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The Judicial Code and Judiciary Act, 28 U.S.C. §2101 states:

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Rules

Fed. R. Civ. P. 54 states:

(b) *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 56 states:

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

Local Rule 13B of the United States District Court for the District of New Jersey provides:

The time within which to answer or reply may, before its first expiration and with or without notice, be extended once for not to exceed fifteen days on order granted by the clerk. Any other extension of time must be approved by the court.

STATEMENT OF THE CASE

Petitioner George L. Karapinka ("Karapinka") seeks to have this Court review the denial of his petition for a writ of mandamus by the Court of Appeals for the Third Circuit, which writ of mandamus sought to compel the Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, to hear a motion for summary judgment filed more than one year after the case was dismissed by the district court.

Within the guise of this petition for a writ of certiorari, petitioner also seeks to have this Court review numerous discretionary actions taken by both the District Court for the District of New Jersey and the Court of Appeals for the Third

Circuit in proceedings below.¹ Defendant-respondent Union Carbide Corporation ("Union Carbide") believes it unnecessary to address the issues raised concerning the district court's and the court of appeals' actions, as they were not properly the subject of review by the court of appeals in denying the writ of mandamus and accordingly are improperly raised by Karapinka in this petition for a writ of certiorari. Moreover, the petition for a writ of certiorari is untimely to the extent that Karapinka seeks review of prior decisions of the district court and the court of appeals which were issued more than ninety days prior to the filing of the petition.

The complaint in this matter was filed on May 6, 1981, with service effected on Union Carbide on June 12, 1981. The complaint alleges that Karapinka was discharged from employment by Union Carbide in 1971 (some ten years previously) on the basis of his national origin (Ukrainian) in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (A1).²

1. The district court's actions which Karapinka incorrectly challenges in his petition include the district court's earlier refusal to enter summary judgment in his favor (although a motion for summary judgment was never made by Karapinka prior to the summary judgment motion at issue here) (Petition, pp. 30-31), the district court's denial of Karapinka's motion for judgment by default (Petition, pp. 28-29), and the entry of the order on mandate dated January 10, 1983 (Petition, pp. 32-33). The court of appeals' actions which Karapinka incorrectly challenges include the granting of Union Carbide's motion to file a supplemental appendix in the prior appeal taken in this case from which a petition for a writ of certiorari was filed and subsequently denied by this Court (Petition, p. 32).

2. All "SA" references are to the supplemental appendix submitted to the court of appeals by Union Carbide in appeal No. 81-2941. All "A" references are to Karapinka's appendix filed with his brief in that same appeal. Both appendices were designated by Karapinka to be certified and transmitted to this Court by the court of appeals as part of the record below. All "PA" references are to Karapinka's appendix included with his prior petition for a writ of certiorari, No. 82-664. All "KA" references are to the appendix included in the current petition for a writ of certiorari.

On July 17, 1981 (after receiving an extension from the district court pursuant to its Local Rule 13B) Union Carbide filed a motion to dismiss or for summary judgment (in lieu of an answer), with a supporting brief and affidavit (A12, A13, A17). Karapinka then served a brief in opposition to Union Carbide's motion along with his affidavit (A31, A27). Subsequent to the filing of the brief in opposition, Karapinka also filed a "Motion to Dismiss the Defendant's Motion" (A42).

On September 22, 1981, Union Carbide's attorneys notified the district court that it would withdraw its motion to dismiss and would serve its answer to the complaint by October 2, 1981 (10 days therefrom; *see A48-49*). The district court confirmed the withdrawal of Union Carbide's motion to the parties in writing and stated that Karapinka's cross-motion to dismiss Union Carbide's motion was thereby rendered moot (A44).

On October 2, 1981, Union Carbide served its answer to the complaint, which was filed on October 5, 1981 (SA6). Additionally, on October 2, 1981, Union Carbide served Karapinka with a notice to take oral deposition and to produce documents, scheduling Karapinka's deposition for October 22, 1981.

Karapinka served a motion for judgment by default on September 24, 1981. That motion was scheduled to be heard on October 19, 1981.

On October 5, 1981, Karapinka filed an amendment to his motion to dismiss Union Carbide's motion (previously declared moot by the district court) seeking expenses allegedly incurred in responding to that motion (A52).

Also on October 5, 1981, the district court stated on the record that Union Carbide's motion for summary judgment had been withdrawn and that Karapinka's cross-motion to dismiss Union Carbide's motion was thereby rendered moot (A66).

Karapinka's motion for judgment by default was heard and decided on October 19, 1981 (A67). The district court denied that motion.

The order denying Karapinka's motion for judgment by default was signed by Judge Debevoise on October 21, 1981, but was not filed until November 2, 1981 (SA15). On October 26, 1981, Karapinka served a motion for reargument concerning the October 19, 1981 hearing (A60). In his motion papers Karapinka complained that the proposed order did not mention Union Carbide's motion to dismiss (which had previously been withdrawn). Additionally, he stated that his brief and affidavit in response to Union Carbide's withdrawn motion to dismiss contained "counterclaims" for summary judgment in his favor and asked the district court to consider these "counterclaims".

Union Carbide opposed the motion for reargument (SA17). The district court, in a letter to the parties, and by order dated November 5, 1981, denied Karapinka's motion for reargument (SA21, SA22), and also amended the order filed November 2, 1981, including therein denial of Karapinka's "motion" for summary judgment (SA22).

Karapinka filed a notice of appeal to the Court of Appeals for the Third Circuit on October 30, 1981 (A64). The appeal was taken from the district court's order denying Karapinka's motion for judgment by default, and the decision of the district court allowing Union Carbide to withdraw its motion to dismiss.

In an order dated November 9, 1981, Judge Debevoise informed the parties that the case would proceed in the district court notwithstanding the pendency of the appeal, it appearing that the order from which the appeal was taken was manifestly not an appealable one.

On November 16, 1981, the district court heard oral argument on Union Carbide's motion to compel plaintiff to appear for oral deposition and for costs and attorneys' fees. This motion was filed by Union Carbide in light of Karapinka's refusal to appear for deposition as noticed on October 22, 1981 and November 4, 1981. At the hearing, Karapinka asserted that he did not believe he had to appear for deposition or proceed with discovery in light of the pendency of his appeal.

The court instructed Karapinka that the case was to go forward at the district court level irrespective of the appeal (which Judge Debevoise indicated was not properly taken). Judge Debevoise stated that the original record was to be kept in the clerk's office (with a copy forwarded to the Third Circuit) so that the case could proceed and discovery could be taken. Additionally, Judge Debevoise informed Karapinka that he was required to appear for his deposition on December 1, 1981, at the courthouse (in deference to Karapinka's arguments about appearing at counsel's office). The court instructed Union Carbide to send a deposition notice to Karapinka providing for same. He informed Karapinka that if December 1 was not a convenient date, he was to telephone Union Carbide's attorneys with alternate dates.

Karapinka did not appear for deposition on December 1, 1981. Based on Karapinka's continued refusal to appear for deposition, to proceed with discovery and to accept service of papers on him,³ and in light of his direct defiance of the court's orders, Union Carbide filed a motion to dismiss the action and for costs and attorneys' fees, with supporting affidavits of Edward

3. Karapinka continually refused to accept service of papers on him and during the course of the litigation returned, among other pleadings, the answer to the complaint, notices to take deposition and requests for production of documents.

P. Lynch and Jill R. Lerner. Karapinka served an answer in opposition to the motion to dismiss on December 8, 1981.

The motion to dismiss was heard on December 21, 1981. Judge Debevoise, after detailing the history of the litigation and indicating Karapinka's direct defiance of his prior orders, granted Union Carbide's motion to dismiss with prejudice. Judge Debevoise indicated that Karapinka acted in total, wilful disregard of the court's instructions and that Karapinka persisted in so doing. Accordingly, the case was dismissed with prejudice by order dated December 23, 1981.

Subsequent to the parties being notified by the court of appeals that Karapinka's pending appeal would be heard without oral argument, Karapinka filed a motion for oral argument (KA14). By order of the court of appeals dated June 24, 1982, this motion was denied.

By order dated June 25, 1982, the court of appeals properly determined that Karapinka's appeal was from a non-appealable order and accordingly dismissed the appeal (PA1).⁴

By order dated July 21, 1982, the court of appeals denied Karapinka's petition for rehearing.

On August 5, 1982, Karapinka served a motion in the court of appeals seeking the opinion on which the order dismissing his appeal was based. By order dated August 23, 1982, that motion was denied on the grounds that the court rendered its decision without an opinion (PA2, 3).

4. By the same order, the court of appeals granted Union Carbide's motion to file a supplemental appendix which contained, *inter alia*, the relevant docket entries in the district court and the order and amended order from which Karapinka was appealing.

On October 18, 1982, Karapinka filed with this Court a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit concerning the Third Circuit's dismissal of his appeal. Union Carbide filed a brief in opposition to the petition for a writ of certiorari on November 17, 1982. The petition for a writ of certiorari was denied by this Court on December 6, 1982.

A certified judgment in lieu of formal mandate was issued by the Third Circuit on December 8, 1982. A motion to dismiss appellee's bill of costs, filed by Karapinka with the Third Circuit on December 15, 1982, was denied on January 11, 1983. An order on mandate was filed by the district court on January 10, 1983.

Karapinka filed a motion to vacate the district court's December 23, 1981 order dismissing the case and the January 10, 1983 order on mandate, which motion was served on January 17, 1983 along with a supporting affidavit. Union Carbide submitted a memorandum in opposition to Karapinka's motion to vacate on February 9, 1983. By order dated March 1, 1983, the district court denied Karapinka's motion to vacate the December 23, 1981 and January 10, 1983 orders of the court.

On March 3, 1983, Karapinka served a motion for summary judgment and supporting affidavit in the district court. Union Carbide served a brief in opposition to the motion for summary judgment on March 14, 1983. The district court denied Karapinka's motion for summary judgment by order dated March 28, 1983 (KA4).

On March 7, 1983, Karapinka served a motion for reargument of the motion to vacate the December 23, 1981 and January 10, 1983 orders of the district court. Union Carbide filed a statement in opposition to the motion for reargument on March 14, 1983.

In light of Karapinka's continuous filing of motions in the district court well over one year after the case was dismissed, Union Carbide served a notice of motion for costs, attorneys' fees and injunctive relief with a supporting brief and affidavit of Edward P. Lynch on March 18, 1983. Karapinka served an answer in opposition to the motion for costs, attorneys' fees and injunctive relief on March 29, 1983. On April 12, 1983, the district court granted Union Carbide's motion for injunctive relief, preventing Karapinka from filing any further motions in the district court without prior approval of the court. At oral argument on April 11, 1983, the court also ruled on Karapinka's motion to rule on the motion for reargument dated April 11, 1983 (seeking reargument of the motion to vacate the December 23, 1981 and January 10, 1983 orders of the district court), thereby denying the motion for reargument.

On April 5, 1983, Karapinka served a petition for a writ of mandamus in the United States Court of Appeals for the Third Circuit, seeking to compel Judge Debevoise to hear oral argument on the motion for summary judgment served on March 14, 1983.

Karapinka's motion for reargument of Union Carbide's motion for costs, attorneys' fees and injunctive relief, treated by the district court as a motion for approval to file such a motion, was denied on May 2, 1983.

Karapinka served a motion to vacate the district court's order of March 28, 1983 (denying summary judgment), along with a supporting brief on April 26, 1983. This motion was opposed by Union Carbide in a letter to Judge Debevoise dated May 3, 1983.

On May 6, 1983, Karapinka served a motion for leave to file an amendment to the complaint, which motion was opposed by Union Carbide by letter dated May 13, 1983. The motion for

leave to file an amended complaint, treated by the district court as one for approval to file such a motion, was denied on May 17, 1983.

On May 12, 1983, the United States Court of Appeals for the Third Circuit denied Karapinka's petition for a writ of mandamus (KA1).

SUMMARY OF ARGUMENT

Karapinka has failed to identify issues of law which would, under Sup. Ct. Rule 17, justify the grant of a writ of certiorari. Rather, his petition seeks to have this Court create exceptions to well established principles which the court of appeals applied in denying his petition for a writ of mandamus.

ARGUMENT

I.

The court of appeals properly denied Karapinka's petition for a writ of mandamus seeking to compel the district court to hear an improper and untimely motion for summary judgment.

The court of appeals, in its order dated May 12, 1983, denied Karapinka's petition for a writ of mandamus. By that writ Karapinka sought to compel the district court to hear oral argument on a summary judgment motion filed more than one year after the case was dismissed. Karapinka now claims that the court of appeals was in error in denying his petition for a writ of mandamus. As set forth below, the court of appeals acted properly and in accordance with clearly established precedent in denying that petition.

By order of the district court dated December 23, 1981, this case was dismissed with prejudice. No appeal was taken from

that final order. On February 28, 1983, Karapinka filed an untimely motion to vacate the December 23, 1981 order of dismissal, which motion was denied. Thus, the order of dismissal remains final and undisturbed.

On March 3, 1983, Karapinka served a motion for summary judgment in the district court seeking judgment on the dismissed claims. In his motion papers, Karapinka ignored the fact that the case had been dismissed by the district court. Further, he made no attempt to explain the procedural basis for his motion, as indeed he could not. Since this case had been dismissed with prejudice, the district court properly denied Karapinka's subsequent motion for summary judgment. Accordingly, the Court of Appeals for the Third Circuit properly dismissed Karapinka's petition for a writ of mandamus seeking to compel the district court to hear oral argument on the summary judgment motion, and rule on the merits.

The remedy of mandamus is a drastic one, invoked only in extraordinary situations. It has been held that the remedy is to be invoked by the court of appeals only where the district court has acted outside the scope of its judicial power. Additionally, it is required that the party seeking issuance of the writ have no other adequate means to attain the desired relief. Further, the party seeking the writ has the burden of showing his right to issuance is clear and indisputable. *Allied Chemical Corporation v. Daiflon, Inc.*, 449 U.S. 33 (1980); *Will v. United States*, 389 U.S. 90 (1967).

In the present case, Karapinka has not met any of the burdens set forth above which would require the court of appeals to grant his petition for a writ of mandamus. With regard to the issue of judicial power, it is clear that the district court had the power to deny Karapinka's motion for summary judgment filed more than one year after the case was dismissed with prejudice.

Further, Karapinka ignored his right to file an appeal with regard to the dismissal of his cause of action. Thus, he passed up the means available to attain the relief he now seeks, even after the district court specifically advised him of his right to file an appeal from the order of dismissal at oral argument on the motion to dismiss (*see opinion of Judge Debevoise dated December 21, 1981*). Since Karapinka failed to pursue the appellate procedures then properly available to him, the issuance of the writ is totally unwarranted.

Finally, Karapinka's contention that the district court was without jurisdiction to dismiss his case in December, 1981 because he had filed a frivolous appeal from a non-appealable order has no merit.⁵ The court of appeals, in its order dated June 25, 1982, properly found the appeal filed by Karapinka from denial of his motion for judgment to have been taken from a non-appealable order.

5. Karapinka's reliance on *District 65, Distributive, Processing and Office Workers v. McKague*, 216 F.2d 153 (3d Cir. 1954) is misplaced. In *District 65*, an appeal was taken from a nonfinal order. During the period of time between oral argument, wherein the appellate court indicated that the appeal should be dismissed as not in conformity with Fed. R. Civ. P. 54(b), and the entry of the order of dismissal, the district court entered an order providing Rule 54(b) certification. The Third Circuit, on the petition for rehearing, held that the district court was without jurisdiction to enter the Rule 54(b) order or any order which would affect the status of the appeal. The court added that even if jurisdiction did exist, the order was improvidently entered. *District 65* does not hold that a notice of appeal completely divests the district court of jurisdiction. Indeed, subsequent cases decided by the Third Circuit and its district courts have, contrary to Karapinka's interpretation, followed the general rule that a district court is not without jurisdiction to proceed merely because a notice of appeal has been filed. *See Guadiosi v. Mellon*, 269 F.2d 873 (3d Cir.), cert. denied, 361 U.S. 902 (1959); *Donovan v. Metal Bank of America, Inc.*, 521 F.Supp. 1024, n.l (E.D. Pa. 1981); accord, *Cochran v. Birkel*, 651 F.2d 1219 (6th Cir. 1981), cert. denied, 454 U.S. 1152 (1982), and cases cited therein.

Reviewing these facts it becomes apparent that Karapinka did not meet his burden of providing the court of appeals with any of the extraordinary circumstances necessary to justify the issuance of a writ of mandamus. Accordingly, the court of appeals acted properly in denying Karapinka's petition for such relief.⁶

II.

The issues raised in Point II of Karapinka's petition are not properly before this Court.

In Point II of the petition for a writ of certiorari, Karapinka raises numerous arguments which are not properly before this Court. The only relevant issue before the Court is whether the Court of Appeals for the Third Circuit properly denied Karapinka's petition for a writ of mandamus. The arguments raised by Karapinka in Point II of the petition concern prior decisions of both the district court and the court of appeals which had no bearing on the summary judgment motion filed in the district court and consequently had no bearing on the denial of the petition for a writ of mandamus. Moreover, to the extent that Karapinka seeks review of decisions which were issued more than ninety days prior to the filing of the petition for a writ of certiorari, the request for review is untimely. 28 U.S.C. §2101(c). Accordingly, there is no basis for Karapinka's request to this Court for review of those decisions and Union Carbide will not respond to those arguments on the merits.

6. Karapinka's further argument that Fed. R. Civ. P. 56 allows for the filing of a motion for summary judgment even after the case has been dismissed is so frivolous as to need no rebuttal.

CONCLUSION

For all the foregoing reasons, respondent Union Carbide Corporation respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Union Carbide Corporation*

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JILL R. LERNER

On the Brief

In The
Supreme Court of the United States

GEORGE L. KARAPINKA,

Petitioner,

vs.

UNION CARBIDE CORPORATION and UNITED STATES
DISTRICT JUDGE DICKINSON R. DEBEVOISE,

Respondents.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 28.1 of the Rules of the Supreme Court, the following is a listing naming all subsidiaries (except wholly-owned subsidiaries), and affiliates of Respondent Union Carbide Corporation: Arizona Welding Equipment Co.; Bayox Inc.; Colombia Welding Products, Inc.; Miami Welding Supply, Inc.; Niect Services Company; Wellnite Company; DCS Capital Corporation; Petromont and Company Limited; Union Carbide Canada Limited; Acetogen Welding Supplies Ltd.; Brouillette Gas & Welding Supplies Ltd.; Buckwold Welding Supplies Ltd.; Canadian Welding Gases Limited; Centrale S.P.C. Inc.; Chicoutimi Silicon Ltd.; Consumers' Welding Supplies Limited; Dominion Viscose Products Limited; Graphic Flexible Packaging

Ltd.; Medigas (Alberta) Ltd.; Medigas Atlantic Limited; Medigas (New Brunswick) Limited; Medigas (Newfoundland) Limited; Medigas Pacific Limited; Medigas (Saskatchewan) Limited; Medigas (Territories) Limited; Metalwelding Supply Company Limited; Rocky Mountain Welding Products Limited; St. Lawrence Welding Products Ltd.; Terra Nova Mechanical Equipment Limited; Tri-Valley Welding Products Incorporated; Union Carbide Canada Mining Limited; Vandry Gas & Welding Products, Ltd.; Welders Supplies Limited; Carbographite Limited; Chrome Corporation (South Africa) (Proprietary) Limited; Elektrode Maatskappy Van Suid Africa (Eiendoms) Beperk; Zimbabwe Mining and Smelting Company (Private) Limited; Karaj Road Property Company Limited; Union Carbide Egypt S.A.E.; Union Carbide Ghana Limited; Ucar Plastics (Ghana) Limited; Union Carbide Kenya Limited; Union Carbide Nigeria Limited; Union Carbide Sudan Limited; Union Carbide Yemen Ltd. (In Formation); P.T. Agrocarb Indonesia; P.T. Karmi Arafura Fisheries; Nippon Unicar Company Limited; Sony-Eveready Inc.; Union Carbide Australia & New Zealand Limited; Chemos Industries Pty. Limited; Delvan Pty. Limited; Joint Industries (HYCEL) 1970 Limited; Union Carbide Australia Limited; Union Carbide New Zealand Limited; Union Carbide Ceylon Limited; Union Carbide Formosa Co., Ltd.; Union Carbide India Limited; Nepal Battery Company Limited; Union Carbide Malaysia Sdn. Bhd.; Union Polymers Sdn. Bhd.; Union Showa K.K.; Argon, S.A.; La Littorale S.A.; Unifos Kemi AB; Unifos Kemi Norsk A/S; Unifos Kemi A/S; Skandinaviska Polypropane Aktiebolaget; Oy Unifos AB; Unifos U.K. Limited; Unifos G.m.b.H.; Unifos Chimie France; Calida Gas B. V.; Indugas N. V.; Union Carbide France, S. A.; Union Carbide Iberica, S. A.; Societe Civile des Produits Lifine; Tungsmina Desenvolvimento de Industrias Minerais Ltda.; Union Carbide Argentina, S.A.I.C.S.; Eletro Manganese Ltda.; Sociedad Anonima White Martins; Eletrometalurgica Saudade Ltda.; Oxigenio Edy S.A.; S. A. White Martins Nordeste.